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No. 80-617

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1980

Elaine Jean Stemple, et. al.,

Petitioner

v.,

Board of Education of Prince George's County, et al.,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX

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APPENDIX A

ELAINE JEAN STEMPLE, by her father, and next friend, Rosswell C. Stemple, Appellant,

v.

THE BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY; Norman H. Saunders; A. James Golato; Lesley Kreimer; Sue V. Mills; Maureen K. Steinecke; Chester E. Whiting; Susan B. Bieniasz; Jo Ann T. Bell; Bonnie F. Johns, Christine A. Dant, Individually and as members of the Board of Education of Prince George's County,

and

State Board of Education of The State of Maryland; Richard Schifter, William Sykes, Mary Elizabeth Ellis, William M. Goldsborough, Joanna T. Goldsmith, Albertine Thomas Lancaster, Lawrence A. Miller, Charles E. Thompson, G. George Asake, Individually and as members of the State Board of Education of the State of

Maryland, Appellees.

No. 79-1208.

United States Court of Appeals,
Fourth Circuit.

Argued March 3, 1980.

Decided May 27, 1980.

WINTER, Circuit Judge:

Plaintiff, by her father, sued the Board of Education of Prince George's County, Maryland (the County), the Maryland State Board of Education (the State) and, in their individual and official capacities, the persons comprising both bodies to obtain a reimbursement for the tuition cost of her private education. Deeming the proffered educational program in the public schools inadequate for her needs, her parents withdrew her from the public schools and enrolled her in a private school for handicapped children. Plaintiff also challenged the state

regulation assigning the burden of proof in state administrative proceedings, in which she contested the adequacy of the public program and the appropriateness of her school assignment. The district court dismissed the complaint, Stemple v. Board of Ed. of Prince George's County, 464 F.Supp. 258 (D. Md. 1979), and, plaintiff appealed. We affirm, albeit for reasons different from those assigned by the district court.

I.

Plaintiff is a multi-handicapped adolescent girl with a long history of physical and emotional disabilities. Since she has attended school, the County and her parents have recognized that she needed special educational training. From 1969 until January, 1976, she was afforded such training by the County and her parents voiced no formal objection to

her placement. During that period, she was taught for the entire school day in the small group setting of special education classes. In January, 1976, the County decided to place her in a normal classroom setting for part of the school day to assist her in developing socialization skills with her peers. By May, 1976, plaintiff's parents concluded that she was not progressing scholastically or emotionally. They therefore withdrew her from public school and placed her in a private non-residential school for handicapped children, located in Alexandria, Virginia. She was a student there until September, 1978, until, after lengthy but cooperative negoations with the County as to the educational program that plaintiff would pursue, plaintiff was re-enrolled in the public schools.

On June 18, 1976, plaintiff, by her father asked the County for tuition reimbursement for her private schooling contemplated for the 1976-77 school year. Her request was pursuant to a state law providing that the cost of a nonpublic school education shall be paid by local authorities of the child's domicile and by the state when the child needs special educational services not provided in a public program. See Ann. Code of Md., Art. 77, § 106D(g). The request was denied in August, 1976. Plaintiff took an appeal, but not until May 27, 1977. A hearing on her appeal was held by the County on August 19, 1977. The hearing officer found that the County could provide plaintiff with an appropriate education in its public schools for the 1976-77 school year and that there was not sufficient evidence to justify her placement in a private school.

Exercising her statutory right to further review, plaintiff appealed the hearing officer's decision to the Maryland State Department of Education Hearing Review Board (the State Hearing Board). See Ann. Code of Md., Art. 77, § 100A. Her appeal was heard on February 17, 1978, and the State Hearing Board's decision was rendered on February 28, 1978. The Board decided that plaintiff "manifests learning needs for which appropriate services can be provided by the Prince George's County Public Schools," and it recommended that she "be returned to the appropriate school within Prince George's County where the support services needed are available." Its findings were directed only to the school year 1976-77 for it deemed itself without jurisdiction to consider funding for May and June, 1976, and the 1977-78 school year.

In the hearing before the State Board, plaintiff sought a ruling that the County bore the burden of proof with regard to the appropriateness of her placement. The requested ruling was contrary to Bylaw 13.04.01.21(B)(6)(h) of the Maryland State Department of Education, which assigns to the party proposing any placement change the initial responsibility to present evidence supporting its appropriateness and places the ultimate burden of proving or disproving appropriateness upon the student's parents, except where school officials do not propose placement in a free educational program. Although the Board ruled at the hearing that it was bound by the bylaw, its decision recited that all of the evidence of all parties had been considered and stated, "[t]his decision is based solely on the evidence and testimony made available for review

and the additional testimony and evidence presented at the hearing."

Plaintiff then instituted this action asserting jurisdiction under § 615 of the Education for All Handicapped Children Act of 1975 (EHCA), 20 U.S.C. § 1415, and § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Section 615 of EHCA had been enacted by Pub. L. 94-142 on November 29, 1975, but it became effective on October 1, 1977, while plaintiff's appeal was pending before the State Hearing Board but after the occurrence of the operative events challenged in the appeal. Plaintiff sought judicial review of both the substantive result and the procedural fairness of the administrative denial of tuition reimbursement. With regard to procedural fairness, plaintiff sought a ruling that, notwithstanding the Maryland bylaw, the burden of persuasion

throughout the administrative proceedings should be on the County and State and not on her, and that, in the proceeding before the State Hearing Board, the State wrongly introduced a written report which she had had no prior opportunity to examine.

The district court granted a motion to dismiss filed by the defendants. It ruled that plaintiff could not obtain judicial review under § 615 of EHCA because the challenged administrative proceedings concern reimbursement for a period prior to the effective date of EHCA. It ruled also that the challenged bylaw did not infringe § 504 of the Rehabilitation Act, and that it was unnecessary for it to rule on the admission of the challenged written report since plaintiff sought money damages from the state and such a claim was barred by the Eleventh Amendment.

See Stemple v. Board of Ed. of Prince George's County, supra.

II

In plaintiff's appeal, her principal contention is that the district court was in error in ruling that § 615 of EHCA was unavailable to permit substantive and procedural review of the state administrative proceedings. She argues that she sought review to vindicate rights theretofore granted in federal and state statutes, not the creation of those rights; and therefore she seeks no retrospective application of § 615. In any event, she contends further, retroactive application of § 615 would be proper under Bradley v. School Bd. of City of Richmond, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974). Her remaining contentions are that, in the administrative proceedings, the burden of proof was improperly placed on her, and the

Maryland bylaw with respect to burden of proof violates federal law. She also asserts that her claim for tuition reimbursement is not barred by the eleventh amendment.

As we view plaintiff's appeal, we need not decide any of the issues that she seeks to raise. Her case reaches us in the posture that the sole ultimate issue to be decided is her claim to tuition reimbursement--either for the school year 1976-77 or for the entire period that she attended the private school. She has voluntarily returned to public school; thus any contentions about the burden of proof in administrative proceedings or the effect of the eleventh amendment in the context of this case are real issues only to the extent that they affect her right to reimbursement. By the language of § 615, if it is assumed to be applicable here, we think

that plaintiff has no right to reimbursement, and that there is thus no need to decide the various issues that she seeks to raise. We elaborate on our conclusion that plaintiff cannot obtain tuition reimbursement under § 615 in what follows.

III.

The EHCA of which § 615 is a part was a further strengthening and amendment of title VI of the Elementary and Secondary Education Act, Pub. L. 89-750, first enacted in 1966. The 1966 legislation was passed to create the Bureau of Education for the Handicapped which was intended to provide strong administrative support and leadership for existing programs for the education of handicapped children. The 1966 legislation was first amended on April 13, 1970, by the enactment of Pub. L. 91-230. The 1970 amendment created a separate act,

the Education of the Handicapped Act, and, inter alia, authorized grants to the States to assist them in initiating, expanding, and improving programs for the education of handicapped children.

A second amendment to the basic 1966 legislation was enacted in 1974 by Pub. L. 93-380, entitled the Education of the Handicapped Amendments of 1974. The 1974 legislation extended Title VI for 3 years, increased federal spending and authority, and added state eligibility requirements to bolster "the steadfast Federal commitment to the education of all handicapped chilren." H. Rep. No. 93-805, 93rd Cong. 2d Sess., U.S. Code Cong. and Admin. News, 4093, 4137 (1974).

The 1975 enactment with which we are most concerned was intended "to establish in law a comprehensive mechanism which will insure that those

provisions enacted during the 93rd Congress [the 1974 legislation] will result in maximum benefits to handicapped children and their families." S. Rep. 94-168, 94th Cong. 1st Sess., U.S. Code Cong. and Admin. News, pp. 1425, 1430 (1975). Congress explicitly recognized that court action and state laws throughout the nation had made clear that the right to education of handicapped children "is a present right." Id. at 1441. Of course, a principal purpose of the 1975 enactment was to pump more money into the local school systems to enable them to meet the requirements imposed upon them by earlier laws, but, inter alia, the bill required the states to establish procedures for consultation with individuals concerned with the the education of handicapped children and procedures to monitor the states'

compliance with the requirements of law, to upgrade classification procedures for identifying handicapped children, and to establish procedural safeguards for parents to contest decisions regarding the identification, evaluation and educational placement of handicapped children.

Section 615, a totally new enactment, was adopted to achieve the last objective. It accomplishes a number of things. It requires any state, local or intermediate educational agency receiving federal funds to establish and maintain certain minimum procedures. § 615(a). These include: a parent's right of inspection of relevant records, designation of a surrogate for a child's parents or guardian if they are not known, written notice and an opportunity to be heard whenever an agency proposes to initiate or refuses to initiate a

change in a child's placement, and a right to an "impartial due process hearing." § 615(b)(1)-(2). The section provides further that, if the required hearing is conducted by a local or intermediate educational agency or unit, a person aggrieved by the decision shall have a right to appeal to the state educational agency, § 615(c), where he shall have the right to be represented by counsel, to present evidence and confront, cross-examine and compel the attendance of witnesses, to receive a record of the hearing, and to receive written findings of fact and decisions. § 615(d). The decision made in a hearing conducted in accordance with the provisions of § 615 is final subject to the right of appeal, and the decision of a local or intermediate unit (where there is no right of appeal) or the decision of a state educational agency may be

reviewed in an action instituted in a state court of competent jurisdiction or a district court of the United States without regard to the amount in controversy. § 615(e)(1) and (2).

Significant for our purposes is the further provision of that section, § 615(e)(3):

> During the pendency of any proceedings conduct pursusant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

Section 615(e)(3) has little specific legislative history of its own. It is mentioned only in the Joint Explanatory Statement of the Conference Committee (Sen. Conf. R. No. 94-455; Home Conf. R. No. 94-664, both of the 94th Cong. 1st Sess.), where it is said:

> The provisions of existing law with respect to the binding effect of due process hearings and appropriate administrative and judicial review of such hearings are clarified and language is also adopted to require that during the pendency of any administrative or judicial proceedings regarding a complaint, unless the State or local educational agency and the parents or guardian of the child otherwise agree, the child involved in the complaint shall

> remain in his or her present educational placement, or, if the complaint involves an application for initial admission to public school the child shall, with the consent of the parents or guardian be placed in the public school program until the completion of all such proceedings.

[1] Taken literally, the language of § 615(e)(3) creates a duty on the part of parents who avail themselves of the hearing and review provisions of § 615 to keep their child in his current educational assignment while the hearing and review provisions are pending, absent agreement between them and the education authorities that some different arrangement be made. Of course, that duty may not be totally

enforceable by the state, but it certainly negates any right on the part of parents, in violation of the duty and in the absence of agreement, to elect unilaterally to place their child in private school and recover the tuition costs thus incurred.

To the extent that we can discern legislative intent from overall consideration of the 1975 act and its forebears and the brief, specific reference to § 615(e)(3) in the legislative history, we think that the statute should be given the literal effect we have described. By enactment of the 1975 legislation, Congress was assuming major control and major financing of the national program of education of handicapped children. As part of that effort, Congress was providing for the strengthening and upgrading of evaluation procedures and

it enacted a generous bill of rights for parents, guardians, and surrogates of handicapped children who might wish to contest the evaluation and placement policies of educational activities. There would be reason and design in saying that while the procedures for administrative hearings, administrative review and judicial review mandated by Congress were being employed, the status quo should be preserved unless it was altered by consent. The concept of preserving the status quo even including the payment of benefits (see, e.g., Longshoremen's and Harbor Workers' Compensation Act § 21(b), 33 U.S.C. § 921(b)), pending litigation at the administrative and judicial level until an ultimate resolution is reached is a familiar one in American law. For example, under Rule 65, F.R.Civ.P., courts will ordinarily refrain from

issuing preliminary injunctions which threaten to disturb the status quo and they will frame any equitable relief to preserve the last uncontested status between the parties which preceded the controversy until the outcome of the final hearing. 11 Wright and Miller, Federal Practice and Procedure § 2948, at 464-66. Thus we think that the statute means just what it says; and since there was a duty not to move plaintiff until a final decision, plaintiff is lacking in any right to recover tuition payments for her parents' unilateral decision to send her to a private school while she was seeking redress for the claimed violation of her rights.

[2, 3] Plaintiff contends that § 615(e)(3) is inapplicable to her, because her parents' decision to send her to a private school was made before the administrative and appeal provisions of

§ 615 were initially invoked. We reject this contention. It places too restricted a reading on § 615(e)(3). We do not think that the application of § 615(e)(3) depends upon the fine distinction between whether proceedings under § 615 are initiated before or after the duty to preserve the status quo is breached. The duty, it seems to us, arises as soon as school authorities make a decision as to identification, evaluation and placement of a handicapped child and continues until a decision not to contest it is reached or, if a contest ensues, until that contest is finally determined.

In summary, we do not decide plaintiff's several contentions. We decide only that if plaintiff is entitled to avail her self of the remedies of § 615 (a question we also do not decide), they will avail her nothing with regard

to reimbursement of tuition expenses. Her subsidiary contentions have become moot since she voluntarily returned to public school.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 79-1208

Elaine Jean Stemple, by her father, and next friend, Rosswell C. Stemple,

Appellant

v.

The Board of Education of Prince Geroge's County; Norman H. Saunders; A. James Golato; Lesley Kreimer; Sue V. Mills; Maureen K. Steinecke; Chester E. Whiting; Susan B. Bieniasz; Jo Ann T. Bell; Bonnie F. Jones, Christine A. Dant, individually and as members of the Board of Education of Prince George's County

and

State Board of Education of The State of Maryland; Richard Schifter, William

Sykes, Mary Elizabeth Ellis, William M. Goldsborough, Joanna T. Goldsmith, Albertine Thomas Lancaster, Lawrence A. Miller, Charles E. Thompson, G. George Asaka, Individually and as members of the State Board of Education of the State of Maryland,

Appellees

O R D E R

Appellants' petition for rehearing and appellees' reply thereto, having been read and considered, it is, with the concurrence of Judge Butzner and Judge Phillips, ORDERED that the petition for rehearing be denied. No judge eligible to do so has requested a poll on the suggestion for rehearing in banc.

FURTHER ORDERED that the opinion heretofore filed be amended in the following respect: in lieu of lines

three and four, page four of the slip opinion, the following shall be substituted:

> From 1969 until January, 1976, she was afforded such training by the County and her parents voiced no formal objection to her placement.

Harrison L. Winter
United States Circuit Judge

Filed August 18, 1980.

APPENDIX C

Elaine Jean STEMPLE, et al.

v.

BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY, et. al.

Civ. No. Y-78-551.

United States District Court,
D. Maryland.

Jan. 22, 1979.

JOSEPH H. YOUNG, District Judge.

This case has been brought pursuant to Section 615 of the Education for All Handicapped Chidren Act of 1975 (hereinafter "EHCA"), 20 U.S.C. § 1415, and Section 504 of the Rehabiliation Act of 1973, 29 U.S.C. § 794. Plaintiffs, Elaine Jean Stemple, a multiple handicapped child, and her father, Rosswell C. Stemple, seek reimbursement from the defendants, Prince George's County, the State of Maryland, and various County and

State education officials, for tuition expended for special schooling at a private institution. The defendants have moved to dismiss the action, and this motion will be granted.

I.

Maryland law requires that "[t]he cost of [a] nonpublic educational program shall be paid by the State and the county in which the child is domiciled" when the child is "in need of special educational services that are not provided in a public county, regional, or State program." Ann. Code of Md., Art. 77 § 106(D)(g). Elaine, a resident of Prince George's County, has a long history of physical and emotional handicaps, including intermittent hearing loss and poor gross and fine muscle coordination. From 1969 until May, 1976, she had been enrolled in various special education programs in

the Prince George's County public schools. In January, 1976, a decision was made by school officials to "mainstream" Elaine, i.e., to place her in the classroom environment which most non-handicapped children experience. This move was necessitated by Elaine's educational progress in the small group setting of her special education program and her need to develop socialization skills. However, Elaine's parents became dissatisfied with the mainstreaming experiment and in May, 1976, removed Elaine from the public schools and enrolled her in the Leary School, a private non-residential school for handicapped children. Plaintiff attended Leary during the summer of 1976 and for the two succeeding academic years. In September, 1978, Elaine returned to the Prince George's County public schools in a mutually

satisfactory program which was the result of negtiations between Elaine's parents and County school officials.

Since June, 1976, plaintiffs have sought for reimbursement from the County and State for the tuition expended for private schooling at Leary. Plaintiffs' request for reimbursement was denied by the County in August, 1976. On May 27, 1977, plaintiffs requested a hearing which was held on August 19, 1977, to determine whether the available public special education programs were suitable to meet Elaine's learning needs. These administrative proceedings resulted in a finding that the County did provide a program during the 1976-77 academic year which reasonably met the needs of a child with Elaine's learning disabilities. Further, it was concluded that there had been insufficient evidence which would justify Elaine's placement in a private

school such as Leary. Plaintiffs appealed this determination to the Maryland State Department of Education Hearing Review Board, which affirmed the County decision in February, 1978.

II.

Plaintiffs bring this action to obtain judicial review of both the substantive and procedural fairness of the administrative denial of tuition reimbursement. Section 615(e)(2) of the EHCA, 20 U.S.C. § 1415(e)(2), authorizes federal district courts to review the record of administrative proceedings on the educational placement of handicapped children, hear additional testimony, and grant such relief "as [it] determines is appropriate." Section 615(b) of the EHCA, and the federal regulations enforcing Section 504 of the Rehabilitation Act, see 45 C.F.R. § 84.36, mandate certain procedural

guarantees which must be afforded students and parents in administrative placement hearings.

Relying upon this statutory authority, plaintiffs advance the following grounds for relief:

(1) The administrative denial of tuition reimbursement was not based upon a preponderance of the evidence;

(2) The plaintiffs unfairly bore the burden of persuasion throughout the proceedings; and

(3) At the proceeding before the Maryland State Department of Education Hearing Review Board, the State wrongly introduced a report which the plaintiffs had no prior opportunity to examine.

III.

The Court can dispose of the first and last of plaintiffs' claims without

reaching the merits of either, and the second of plaintiffs' grounds for relief, the allegedly wrongful allocation of the burden of proof is sufficiently without merit to warrant serious consideration.

A. Substantive Review of the Administrative Proceedings

[1] Plaintiffs rely entirely upon Section 615(e)(2) of the EHCA as authority for a recovery on the basis of a substantive review of the administrative record. However, the critical question presented by the facts of this case is whether the EHCA is effective for the purpose of plaintiffs' present claims.

Although enacted by Congress in 1975, the EHCA did not become effective until October 1, 1977. Further, Paragraph (a) of Section 615 expressly conditions the procedural safeguards

mandated by the Act, including judicial review, upon receipt by the state or local education agency of funds authorized by the Act. The administrative proceedings of which plaintiffs now complain concern reimbursement for a period prior to the effective date of the EHCA and, consequently, the appropriateness of the funds it authorized. Since the benefits which plaintiffs now seek were never supported by EHCA funds, the Act's procedural guarantees are not applicable.

A similar conclusion was reached in Milan v. Board of Education of Prince George's County, Civ. No. N-78-637 (D. Md. September 22, 1978). On facts closely parallel to those of the present case, the Court dismissed a suit brought under the EHCA for denied reimbursement of tuition for private schooling during

the 1977-78 academic year. In Milan, the Court held that since the administrative proceedings challenged under the Act had been initiated prior to the Act's effective date, the challenged proceedings were not mandated by the Act nor subject to the Act's procedural protections. As no fact significantly distinguishes the present action from Milan, its reasoning is persuasive in this instance, barring plaintiffs' claim for substantive review of the State and County proceedings under the EHCA. See also Howard S. v. Friendswoods Indep. Sch. Dist., 454 F.Supp. 634, 637 (S.D. Tex. 1978).

B. Allocation of the Burden of Proof

[2] The Milan holding would entirely dispose of this action were it not for the fact that plaintiffs also

seek relief under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. While the EHCA was not binding on the proceedings held to determine plaintiffs' eligibility for tuition reimbursement for private schooling prior to October 1, 1977, County and State authorities were nevertheless bound to comply with the Rehabilitation Act. Howard S. v. Friendswood Indep. Sch. Dist., 454 F.Supp. at 637. In May, 1977, the Department of Health, Education, and Welfare issued regulations to enforce Section 504. See 45 C.F.R. Part 84 (1977). Recipients of Rehabilitation Act funds are required by 45 C.F.R. § 84.36 to provide certain procedural safeguards "with respect to actions regarding the identification, evalution, or placement" of handicapped children. The minimum procedures

required by the regulations which became effective on June 3, 1977,[1] include only

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[1] Section 504 of the Rehabilitation Act confers upon an aggrieved party an implied right of action to enforce compliance with the Act. Davis v. Southeastern Community College, 574 F.2d 1158 (4th Cir. 1978); Leary v. Crapsey, 566 F.2d 863 (2d Cir. 1977); United Handicapped Federation v. Andre, 558 F.2d 413 (8th Cir. 1977); Lloyd v. Regional Transportation Authority, 548 F.2d 1277 (7th Cir. 1977). Defendants contend that such an action may not be included in this case because the State was not, at the time of the administrative proceedings in question, obliged to comply with the procedures mandated by 45 C.F.R. § 84.36.

While 45 C.F.R. §84.33(d) did not require full compliance with the Rehabilatation Act regulations until September 1, 1978, the defendants were not among the class of recipients under the Act excused from full compliance until that date. The period of grace permitted by § 84.33(d) was expressly reserved for those recipients "that [were] not, on the effective date of this regulation, in full compliance with the other requirements of the preceding paragraphs of this section. . . ." On June 23, 1977, when 45 C.F.R. Part 84 became effective, the State of Maryland had already established educational programs for handicapped children which fully complied with the provisions of § 84.33, requiring recipients to provide a

"notice, a right to inspect records, an impartial hearing with a right to representation by counsel, and a review procedure." 45 C.F.R. Part 84, App. A at 387. Allocation of the burden of proof in placement proceedings upon school authorities is not a procedural guarantee mandated by the Rehabilitation Act. Nor can the Court, in view of the procedures afforded the plaintiffs,[2]

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[1] a free appropriate education to all handicapped children. See Ann. Code of Md., Art. 77, §§ 99, 106D. Moreover, by the time the regulations went into effect, the state had already adopted hearing procedures which satisfied the minimal requirements of 45 C.F.R. § 84.36. Thus, as the State was already in compliance with the relevant federal regulations at the time these regulations became effective, the regulations were immediately binding upon the state.

[2] The procedural protections afforded parents and students in local placement hearings are set forth in Code of bylaws of the Maryland State Board of Education (hereinafter "State Bylaw"), 13.04.01.21(B). These procedures include notice of the matters at issue,

conclude that the allocation of the burden of proof to parents and students challenging the appropriateness of available public programs[3] has denied

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[2] (B)(3), the right to inspect and copy all records pertaining to the child, (B)(4), the right to be represented by counsel at the hearing, (B)(5), the right to present evidence through documents and witnesses, (B)(6)(a), the right to require the attendance of witnesses, (B)(6)(b), the right to question the witnesses presented by the school authorities, (B)(6)(c), the right to an impartial decision maker, (B)(6)(d), the right to a decision based solely on the evidence presented, (B)(6)(g), and a right to an administrative appeal of the decision, (B)(7).

[3] See State Bylaw 13.04.01.21(b)(6)(h), which provides, as follows:

> It shall be the initial responsibility of the party proposing any placement action to present evidence which supports its appropriateness and then any evidence to the contrary shall be presented. The ultimate burden of proving or disproving appropriateness by a prepondernace of the evidence shall be upon the parent(s) or guardian(s), except that school officials shall bear the burden when a placement action proposed

plaintiffs the "meaningful opportunity to be heard" which due process affords. [4]

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[3] by them does not involve placement in a free educational program. A placement shall be deemed appropriate if it reasonably meets the educational needs of the child and there do not exist any significantly less restrictive programs which would satisfy such needs equally well.

[4] In Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), the Supreme Court observed that "[t]he essence of due process is the requirement that a 'person in jeopardy of serious loss [be given] notice of the case against him and the opportunity to meet it.'" Id. at 348, 96 S.Ct. at 909 (citation omitted). Typically, the procedures satisfying the requirements of due process are embodied in the protections provided in State Bylaw 13.04.01.21(b). These procedures include:

"(a) Notice and specification of the charges.
(b) Opportunity to be heard.
(c) Opportunity to confront accusers.
(d) An impartial tribunal."

See Patterson v. Ramsey, 413 F. Supp. at 536. The procedures provided by the State afforded plaintiffs ample opportunity to present their case for tuition reimbursement. Morover, plaintiffs allege no violation of these procedural requirements at the local

See, e.g., Patterson v. Ramsey, 413 F.Supp. 523, 540 (D. Md. 1976), aff'd, 552 F.2d 117 (4th Cir. 1977); also Chung v. Park, 514 F.2d 382, 387 (3d Cir. 1975); Toney v. Reagan, 467 F.2d 953 (9th Cir. 1972), cert. denied, 409 U.S. 1130, 93 S.Ct. 951, 35 L.Ed.2d 263 (1973). Accordingly, the County proceedings subject to State Bylaw 13.04.01.21(B)(6)(h) were not thereby rendered institutionally nor statutorily infirm.

C. Introduction of Records which Plaintiff had no Prior Opportunity to Examine

[3] This final claim concerns an alleged procedural impropriety at plaintiffs' hearing before the Maryland

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[4] hearing. Inasmuch as the allocation of the burden of proof affected only the weight given the plaintiffs' contentions once plaintiffs had exercised their right to be heard, and as the burden in question is neither excessive nor extraordinary, it in no way diminished plaintiffs' opportunity to be heard.

State Department of Education Hearing Review Board. At the hearing, Virginia Cieslicki, a placement specialist with the special education division of the Maryland State Department of Education, read into evidence a prepared written statement which constituted the Department's official position on the appropriateness of the placement offered Elaine. This position statement was made pursuant to State Bylaw § 13.04.01.21(A)(5)(d), which requires the Department to present, "preferably in writing or orally if the Hearing Review Board desires, a complete review of the State Department of Education's position supporting the action that has been taken." Plaintiffs contend that the statement should not have been introduced by state authorities because they had no prior opportunity to examine it. However, the Court need not reach

the merits of this claim because the state defendants, who were responsible for the proceeding in question and any alleged wrong to the plaintiffs, are immune from suit in this action under the Eleventh Amendment.

While the Eleventh Amendment expressly bars suit against a state by a foreign government or the citizens of another state, judicial construction of the Amendment extends this immunity to preclude suits against a state by its own citizens. See Edelman v. Jordan, 415 U.S. 651, 662-63, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) (and cases therein cited). This constitutional immunity proscribes actions by a private party or foreign government which, absent consent by the state, seek "to impose a liability which must be paid from public funds in the state treasury." 415 U.S. at 663, 94 S.Ct. at 1356.

However, since the time of the Supreme Court's decision in Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), the Eleventh Amendment has been held not to bar prospective injunctive relief against a state, even though such relief may have some impact on state funds. Edelman v. Jordan, 415 U.S. at 667, 94 S.Ct. 1347. In Edelman, the Court distinguished such prospective relief which is permissible under Ex Parte Young, supra, from a retroactive award of damages made in reparation for past wrongs. Edelman involved an appeal of a district court's retroactive award of welfare benefits which claimants would have received had their claims been processed in accordance with HEW regulations. While upholding the lower court's determination that the benefits had been wrongfully denied, the Court nevertheless vacated all but the

perspective relief awarded to the parties, observing:

> "While the Court of Appeals described this retroactive award of monetary relief as a form of 'equitable restitution,' it is in practical effect indistinguishable in many aspects from an award of damages against the State. It will to a virtual certainty be paid from state funds, and not from the pockets of the individual state officials who were the defendants in the action. It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials." Edelman v. Jordan, 415 U.S. at 688, 94 S.Ct. at 1358 (emphasis provided).

Applying the above principle to the facts of the instant case, the Court must conclude that plaintiffs are effectively seeking an award of damages against the state.[5] Plaintiffs have alleged a past

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[5] Counsel for plaintiffs conceded in oral argument that money was the ultimate issue in its claim for relief. Nominally, plaintiffs have brought this action seeking injunctive relief entitling them to another administrative hearing to secure reimbursement. However, as Elaine has already been placed in an adequate public educational program, the only conceivable consequence of a judgment against the state would be to facilitate a monetary recovery. To afford plaintiffs an opportunity to raise again their claims for monetary relief, the Court must find plaintiffs implicitly entitled to recover funds which another administrative proceeding might provide. As the Court is precluded by the Eleventh Amendment from directly ordering the State to reimburse the plaintiffs for educational fees, absent waiver, see Edelman v. Jordan, supra, it is constitutionally precluded from achieving indirectly which it could not do directly. Cf. Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464, 65 S.Ct. 347, 89 L.Ed. 389 (1945).

breach of a legal duty respecting certain procedural defects in the state review of her request for tuition reimbursement, and by challenging the procedural correctness of the denial of this request, plaintiffs ultimately seek a recovery of money from the state which is precluded by the Eleventh Amendment. See Edelman v. Jordan, supra, Jagnandan v. Giles, 538 F.2d 1166 (5th Cir. 1976), cert. denied, 432 U.S. 910, 97 S.Ct. 2959, 53 L.Ed.2d 1083 (1977).

Inasmuch as plaintiffs have stated no claim against the County defendants which this Court has jurisdiction to entertain or which warrants it serious consideration, resolution of the state defendants' Eleventh Amendment objection to liability accordingly disposes of this action. Only the state defendants were legally responsible for the conduct

of the proceeding before the State Department of Education Hearing Review Board. See Ann. Code of Md., Art. 77 § 100A. Moreover, other than the claim under Section 615 of the EHCA, which has been held to be of no legal consequence, and the burden of proof claim, which is without merit, plaintiffs have cited no breach of a legal duty for which the county defendants may be found liable. Despite the fact that under Maryland law, the State and the County are jointly responsible for providing funding for Elaine's education, see, e.g., Ann. Code of Md., Art. 77, §§ 106D(g), 106G-3, 106G-4, the present action would permit a possible judgment only against the state defendants, and such judgment is barred by the Elventh Amendment.

Accordingly, it is this 22nd day of January, 1979, by the United States

District Court for the District of Maryland, ORDERED:

1. That the motions to dismiss of each and every defendant be, and the same are, hereby GRANTED; and

2. That copies of this Memorandum and Order be mailed to the attorneys for the plaintiffs and the defendants.

APPENDIX D

Maryland State Department of Education
P. O. Box 8717, BWI Airport
Baltimore, Maryland 21240

February 23, 1978

Dr. Linda J. Jacobs
Assistant State Superintendent
Maryland State Department of Education
Division of Special Education
P. O. Box 8717, BWI Airport
Baltimore, Maryland 21240

Dear Dr. Jacobs:

The Maryland State Department of Education Hearing Review Board convened on February 17, 1978, and heard the case of Elaine Stemple relative to the diagnosis and evalution of the educational program provided for the child by the Prince George's County School System.

The hearing was held in accordance with Article 77, Section 100A of the Annotated Code of Maryland, Volume XLIX, June 1975, with the following reviewers

hearing tne case: Dr. Betty Sims, Chairperson, Ms. Rozelle Miller and Mr. Lynn Jones.

The Hearing Review Board has reviewed the diagnostic data supplied by the Prince George's County Public School System and that provided by the parents. In addition, the plans evidenced by the Prince George's County Public School system to provide for Elaine Stemple in the 1976-77 school year were reviewed, as was the evidence presented by her present school placement. After reviewing all evidence made available by the Prince George's County Public Schools and the Leary School, the panel has arrived at a decision. This decision is based solely on the evidence and testimony made available for review and the additional testimony and evidence presented at the hearing.

The Hearing Review Board has duly

noted objections of the attorney for Elaine Stemple and the Prince George's County Public Schools for the records. The findings of the Board are directed to the school year 1976-77 only. The Board is without jurisdiction to consider funding for May and June, 1976 and the 1977-78 school year. The parents have the right of due process for the current school year.

The Hearing Review Board finds that Elaine Stemple manifests learning needs for which appropriate services can be provided by the Prince George's County Public Schools.

This finding is predicated upon the following review:

There is extensive psychological and educational assessment data from 1969 through the present. Review by the Hearing Review Board of the diagnostic information indicates that Elaine

Stemple is a child with learning disabilities. The learning disabilities manifest themselves in processing, language and motor problems. This finding is consistent with those stated in a letter by Dr. Gardner (2-9-78). She states that there is a myriad of secondary malfunctions associated with minimal brain damage, thus clarifying the etiology of the learning deficits.

In addition to the learning disability and associated behaviors, there is a history of an intermittent hearing loss related to an allergy. Early reports from Children's Hearing and Speech Center (10-7-69) indicated a moderate hearing loss, possibly delaying early speech development. Later reports from Prince George's County Health Department (11-10-70 and 9-3-71) indicated that the hearing level was with normal limits. The recent reports from

University of Maryland Hospital Central Evaluation Clinic for Children (1-18-78) states that hearing is presently within normal limits.

The conditions as delineated above, plus the estimate of borderline to dull normal intellectual functioning are within the range of behaviors found in the public schools of Prince George's County. The Hearing Review Board, therefore, finds that Elaine Stemple can be included in a public school program.

In considering the educational program for Elaine Stemple, it is noted that at the time of entry into the Leary School, an evaluation (7-9-76) states "Elaine has shown us that she has good basic reading and phonics skills. . . Elaine is able to add, subtract, multiply and divide with good accuracy. . . She is very eager to contribute to discussions. . . She has an adequate

supply of general information." She was rated "satisfactory" in classroom performance. in personal adjustment and in peer relations. This substantiated that academic skill and social development had occurred while Elaine was in the Prince George's County Public Schools. Testimony by Elaine's teacher also confirms progress commensurate with the reports prior to the time of termination from the public schools (10/76 through 6/77). This further confirms progress consistent with intellectual expectations.

It is recommended that Elaine be returned to the appropriate school within Prince George's County where the support services needed are available.

The Individual Education Program should be reviewed and further developed by school personnel, Elaine and her parents. The Program should include

vocational training to allow for the use and further development of the functional skills she has attained.

Counseling for Mr. and Mrs. Stemple to assist them in management of behavior and settling long-range goals for Elaine should be offered.

In behalf of the Hearing Review Board

/s/ Betty Simms

Betty Simms
Chairperson

APPENDIX E

In the Matter of Elaine Jean Stemple: Before the Prince George's County Hearing Officer for Special Education Programs.

Decision

This Matter was referred to the Hearing Officer by the Prince George's County Public Schools for a hearing. The hearing was held on August 19, 1977 at the Northern Area Office of Special Education of Prince Geroge's County.

Both the Staff of the Prince George's School System and Mr. and Mrs. R. Stemple were represented by Counsel. Mr. and Mrs. Stemple elected to have a closed hearing.

The Hearing Officer took under advisement the following: 1. petitioner's objection to the Hearing Officer's preliminary statement that the burden of proof is upon the petitioner rather than the school board citing the

Rehabilitation Act, Sec. 84.34 as an authority. The Hearing Officer finds that the burden referred to is not applicable to this situation in that it only applies when the school system wishes to remove a student from the regulation educational environment, and 2. the question brought out by the staff that the petitioner was requesting funds for May and June of 1976. According to Local Hearing Procedures, Rule 13.04.01.21B3d. it stated that the parents may at any time prior to the ending of the school year, make a request for reimbursement. The parents having failed to do so, it is the opinion of this examiner that she has no authority to hear the question. The year 1976-77 is the year in question and there is no problem in the request. The petitioner also asked for the following full year. It is the position of the Hearing Officer

that she has no authority to hear such question in that it is impossible to make educational assessments of a child's need for two (2) years in the future.

After consideration of all the evidence and testimony presented at the hearing by both parties and due deliberation I find that the Prince George's County School System did have a program during the school year 1976-77 and does have a program which reasonably meets the needs of Elaine Jean Stemple and further, that there has been insufficient evidence which would justify placement of Elaine Jean Stemple in a non-public educational institution such as the Leary School.

Dr. Lucy C. Kotarides
Hearing Officer.

Re: Elaine Jean Stemple

In keeping with procedures established by the Maryland State Board of Education and Prince George's County Board, a review of the case of Elaine Jean Stemple was heard by Dr. Lucy C. Kotarides, Hearing Officer. Representative of the Prince Geroge's County School System and Mr. and Mrs. Stemple (both parties were represented by counsel) presented their respective cases at the petitioner's request the hearing was declared closed to the public.

The placement of Elaine Jean Stemple recommended by Prince George's County Public School System was rejected by petitioners as inappropriate for their daughter. They subsequently applied for funds to defray the cost of

education at a small non public private school, Leary School, which they maintain is an appropriate placement for her. To obtain this assistance it must be shown that the available program at William Beanes Elementary School is not an appropriate program.

In accordance with provisions of Bylaw 411:111 (13.04.01.01 A-4) under which this hearing was conducted, I would like to provide you with a statement of findings and conclusion upon which this decision is based. The following are the specific findings and conclusion:

1. Based on petitioners' exhibits 2-2, 92, 14, Elaine Jean Stemple is a child with a learning disability.
2. That her learning problems include deficits in expressive language, poor speech articulation and perceptual motor difficulties, (petitioners exhibits 3-2, 14.)

3. That Elaine possesses sound intellect (petitioner's exhibit 9-2) (staff exhibits 3-1.). That although she functions within the border-line defective range, her variable performance on psychological testing suggests average potential.

4. That Elaine has normal hearing (petitioners' exhibit 3-2, 7, 12). That a chronic ear infection and allergies cause fluid to accumulate in the ear resulting in an intermittent hearing loss and that with proper medication and treatment normal hearing is restored, (petitioners' exhibit 25-5).

5. That in 1969 Elaine was enrolled in the Prince Geroge's County Public Schools and attended Suitland Elementary.

6. That on December 1, 1970 Elaine was referred for Psychological evaluation (staff exhibit 3-1), it was recommended that she needed special services and that she be placed in a special education program.

7. That Mr. & Mrs. Stemple were notified of said referral and placement in a special education program and that during the school year 1971-72, Elaine was placed in a special education class.

8. That while Elaine attended special education classes her needs were adequately evaluated and assessed through the use of formal and informal testing, petitioners' exhibit 8, 17, 20-1, 20-2.

9. That as a result of her continued progress in mid-year of the 1975-76 term the educational team felt it

appropriate to mainstream Elaine for a trial period in a regular classroom situation with continued assistance by the special education teacher (staff exhibit 15).

10. That in May 1975 Mr. Stemple removed Elaine from the William Beanes Elementary School and enrolled her in the Leary School, this in spite of her progress and Elaine's testimony at the hearing that she liked the William Beanes School.

11. That an examination of the Prince George's educational management plan and the Leary School plan for Elaine are similar. Both plans provide for academics Language Arts, speech therapy and gross motor activities.

12. That the Leary School program places Elaine in a small structural

classroom situation for a full day's program while the program at the William Beanes School places Elaine in a small structured classroom for a period of two hours daily.

13. That the Prince George's County Public Schools did arrange for an appropriate education for Elaine in the least restrictive environment.

In accordance with Bylaw 411.11, I would like to advise you that you have a right to appeal the aforestated decision of the Hearing Officer. This appeal is to be made to the State Department of Education. If you wish to appeal this matter, you are required to file a written request for appeal. This written request should be mailed to:

Dr. Linda Jacobs
Assistant Superintendent of Schools
Maryland State Department of Education P. O. Box 8717, BWI Airport
Baltimore, Maryland 21240

In the interim if the Office of Special Education can be of assitance to you do not hesitate to contact Mrs. Jane Riggin at 301-952-4360.

Yours Truly,

/s/ Lucy C. Kotarides

Lucy C. Kotarides
Hearing Officer

APPENDIX F

Letter One

Inquiry by:
James T. Micklem, Director
Div. of Special Education and
Support Services
Dept. of Education
P.O. Box 60
Richmond, Virginia 23216

Text of Inquiry
(January 17, 1979)

This refers to our recent telephone conversation pertaining to funding for a child previously placed by an LEA in an approved private school for the handicapped but whose renewed funding is to be determined pending an appeal through established due process procedures.

Basically, the situation is as follows:

1. The child was determined eligible for services by a public school division for the 1977-78 school year.

2. The child was placed in a private school for the handicapped during that school year as school division personnel felt an appropriate educational program was not available locally.

3. A request for continued placement in the private school was made to the local school division for the school year but was denied on the grounds that an appropriate program was available locally. Parents initiated an appeal through the due process procedure.

4. The school division has taken the position, based upon advice of the school's attorney, that funding would be available to the parent only if the school division loses the appeal for that period of time the child attends the private

school during the pending of the appeal.

Your interpretation of federal regulation regarding this matter is requested. For your infromation, I have enclosed a copy of an informal opinion received from the Virginia Attorney General's Office pertaining to this issue. [Opinion has been deleted].

Text of Response
(March 14, 1979)

You asked if a local school district is responsible for the cost of tuition, during a due process hearing on the appropriateness of that placement, when the parent has placed the child in a private school without prior agreement of the local school district. Parents may choose to send a child to a private school rather than take advantage of a free appropriate public education. If this happens, there is no requirement for

the State or local educational agency to bear the cost of the private school tuition. In this situation the cost of tuition could not be considered the responsibility of the State or local educational agency under the provisions of the Part B regulations (121a.513) unless the public agency and the parents of the child agree. This agreement is unlikely in that the placement is the substance of the disagreement under consideration in the due process hearing.

On the other hand you also asked if a local school district is responsible for the cost of tuition, during a due process hearing, when a local school district has placed the child and a disagreement develops as to the continuation of such a placement. In this case the provisions of the Part B regulations (121a.513) shall apply. Therefore the

local school district must continue the payment of tuition until all due process proceedings have been completed. This included judicial proceedings as well. Exceptions may be taken to this provision if both the parents and the school district agree otherwise.

Payment for the cost of tuition during the pendency of a due process proceeding is not to be considered a retroactive payment based upon the success of a parent's complaint in a due process proceeding when a child is placed by the State or local educational agency. The payment of the cost of tuition is to continue during a due process hearing if the local or State educational agency has placed the child.

William D. Tyrrell, Chief
Policy Section
Bureau of the Education for
the Handicapped.

'ext of Inquiry
(May 1, 1979)

You will recall our earlier correspondence regarding the responsibility of a local school board to maintain and finance the education of a handicapped child in a private school during the pendency of an administrative or judicial appeal.

At' issue is a situation in Fairfax County, and you can see from the enclosed correspondence the questions that have been raised by Mr. Thomas J. Cawley, Esquire, Counsel to the Fairfax County School Board. Please see what you and your staff can do to help me answer the specific questions raised by Mr. Cawley.

(Enclosed Correspondence)

As counsel to the School Board of Fairfax County, I am writing to you with regard to your recent letters on the

question of whether a school board has the responsibliity for funding the continuation of a private placement where the school board has now offered a placement within the system or a less restrictive private placement. I have the following observations.

1. You have previously shared with Mrs. Beatrice H. Cameron your correspondence with the Bureau of Education for the Handicapped. While it was apparent from those letters that the question was to be referred to the Office of the General Counsel of the Department of Health, Education, and Welfare, the ultimate response was from the Chief of the Policy Section of BEH. It is therefore unclear to us whether the response from BEH represents a legal opinion of HEW or merely a policy view of BEH.

2. The practical consequence of the position expressed in the letter from Mr. Tyrrell of BEH is that once a child is placed by a local board in a private special education setting, it will not ever be able to return the child to a less restricted educational environment unless the parents agree. This is because the due process appeals including the judicial avenues available to parents will in every case take at least a school year to resolve. Of course, the parents can initiate a new appeal each school year. This will mean that <u>regardless</u> of the outcome of the hearings and judicial consideration of the merits of the case, the private placement will continue year after year. Effectively, the

decision of the parents on the question of appropriate special education will control even if all hearing officers and judges agree with the position of the school board.

The policy of continuing funding will also cause, in my view, increased appeals (since it will insure private funding) and it may cause school boards to be very reluctant to consider trying private placements for a trial period of a year since they will realize that it will be impossible to ever discontinue funding unless the parents agree.

3. I think the position of continuing payments during appeals is wrong from a legal standpoint. The local education agency is required to determine at least annually each

handicapped child's placement. 45 C.F.R. § 121a.552(a). A child must remain in his or her present educational placement during the pendency of any administrative or judicial proceeding. 45 C.F.R. § 121a.513(a). Read together, these two sections mean that the child's present placement is that which the LEA declares it to be. This conclusion is buttressed by §121a.504. That section provides that parental consent must be obtained before:

(a) Conducting a preplacement evaluation; and

(b) Initial placement of a handicapped child in a program providing special education and related services.

45 C.F.R. §121a.504(b) (emphasis supplied). It follows that it is

unnecessary to obtain parental consent before changing a child's placement from a private special education facility to a public special education facility. Since it is unnecessary to obtain consent in such a case, it is clear that the LEA's declaration of placement is effective immediately and is, therefore, the "present placement" as that term is used in § 121a.513(a). It follows that the LEA cannot be held responsible for costs incurred by leaving the child in a private school when an appropriate public facility has been offered. If the public facility is found to be inappropriate then the LEA should pay the expenses incurred during the time of the appeal.

Nor does this interpretation prejudice the due process rights of the parents or child. Under the regulations, the child may continue to receive an education at public expense. In this particular instance, the education will be offered in the facility chosen by the LEA until that agency's decision is proved wrong by the parents. The Act only guarantees that a handicapped child will receive "a free and appropriate education," it does not guarantee that such a child will receive an education preferred by the parents.

I have previously been supplied a copy of an informal Attorney General's opinion on this subject. That opinion states that, "Since the issue of an appropriate program is being determined by due process procedures, there is no

mandate under Public Law 94-142 or Virginia law for a school division to pay the private school pending the outcome of the case."

It seems to me that the philosophy of Public Law 94-142 is that neither the school system nor parents should be able to make an irrebuttable decision as to what is the least restrictive appropriate special education for the child. It therefore seems inconsistent with the goals of this law to establish a procedure whereby the parents can effectively eliminate the school system's position on placement and guarantee years of funding of an inappropriate placement for the student. Certainly the student is not served by that situation.

I would appreciate your inquiring into the legal position of HEW's Office of the General Counsel and the Virginia

Attorney General's office on this subject and your consideration of the other points of this letter. Thank you.

Text of Response
(May 15, 1979)

The following is in response to your letter of May 1, 1979 regarding the responsibility of a local school board to maintain and finance the education of a handicapped child in a private school during the pendency of administrative or judicial proceedings.

This issue was addressed in a letter you received from my staff on March 14, 1979. The BEH's position in this matter is summarized in paragraphs three and four of that letter. The HEW Office of General Counsel has reviewed this matter and concurs in those interpretations of the statute and regulations.

We do not agree with the statement in Mr. Cawley's letter that under 45

C.F.R. § 121a.513 (the requirement that a child's present placement must be maintained during administrative or judicial proceedings), "The child's placement is that which the LEA declares it to be."

1. It is correct that under Section 121a.552 of the regulations, an LEA must annually determine a handicapped child's placement. However, this must be done through a reassessment of the child's Individualized Education Program (IEP) with the parents involved as required in Sections 121a.340-121a.349. A change in placement cannot be made unilaterally be the LEA.

2. If the parents and LEA cannot agree on the proper placement, the LEA may propose to change the existing placement, but not before it gives

the parents the notice required under Sections 121a.504-121a.505.

3. The notice to the parents informs them of their procedural rights under the statute and regulations. The parents may initiate a hearing under Section 121a.506, and if they do not prevail at the hearing, may exercise their appeal rights under Sections 121a.510-121a.511.

A concern was expressed in Mr. Cawley's letter that the hearing, State Review, and civil action available to parents would result in an inordinate delay before a child's placement could be changed. However, it is our understanding that very few civil actions result from these cases. Further as you know, the regulations specify timelines for the hearing and State Review. If an LEA begins the IEP Review

at an early date each year, and the hearing and review timelines are adhered to, the delays in making necessary changes in a placement should be minimized.

It is the State's responsibility to insure that the Fairfax County LEA complies with the requirements summarized in this letter and in the letter of March 14, 1979. Please inform us by June 15, of the action the State has taken to resolve this matter with the LEA.

Thomas B. Irvin, Chief
State Policy and Administrative
Review Branch
Bureau of Education for the
Handicapped.

Inquiry by:
Mr. T. D. Beck
5119 Concordia St.
Fairfax, Va. 22031

Letter Two
"ext of Inquiry
(October 30, 1979)

I would appreciate it very much if you could provide clarification of the rules and regulations pertaining to the Education of the Handicapped Act. Clarification is requested on the following issues.

1. Responsibility and requirement for the school system to implement an Individual Education Program (IEP) when provisions in the IEP have been agreed upon and signed by the public school official, private school officials and the parent.

2. Responsibility and requirement for the school system to provide items agreed upon and contained in the signed IEP, but under dispute and appeal in the next annual review. Do the provisions once agreed upon but now disputed by the school system have to continue if the

parents do not agree to delete these provisions and have initiated a due process review? Must the school system continue to provide for and pay for the disputed services pending the completion of all administrative or judicial proceedings?

3. Responsibility and requirement for the school system to pay for room and board, transportation and psychological services for a residential placement by the school system when these items are a part of the program package provided and required by the program at the residential institution.

4. Requirement for the school system to pay for 12 month school year program and psychological services for a day school placement when these items are included in an agreed upon and signed IEP.

This information is needed for a state review of a special education hearing. A reply by November 9, 1979 is requested.

Text of Response

This letter is being developed in response to an inquiry you sent on October 30, 1979 requesting clarification of the P. L. 94-142 regulations. I will attempt to respond to each of your concerns as stated.

1. Responsibility and requirement for the school system to implement an Individualized Education Program (IEP) when provisions in the IEP have been agreed upon and signed by the school official, private school officals and the parent.

While the IEP is seen as neither a legal document nor a legal contract it does represent a commitment of resources necessary to enable a handicapped child

to receive needed special education and related services. In fact, the delineation of services to be provided is one of the primary purposes of the document. In effect, the IEP is an agreement (with LEA and parental approval) for services to be provided. Stated another way, the services set out in the IEP must either be provided to the child, or the IEP must be amended.

2. Responsibility and requirement for the school system to continue to provide items agreed upon and contained in the signed IEP, but under dispute and appeal in the next annual review. Do the provisions once agreed upon but now disputed by the school system have to continue if the parents do not agree to delete these provisions and have initiated a due process review?

Must the school system continue to provide for and pay for the disputed services pending the completion of all administrative or judicial proceedings?

If the school system placed the child in a given program with specific services as outlined in the IEP and a disagreement develops regarding services being provided, the provisions of Section 121a.513 of the P.L. 94-142 regulations apply if a complaint has been filed.

(Text of Reg. 121a.513 is deleted.)

Therefore, the local school district must continue services until all complaint proceedings have been completed. This includes administrative as well as judicial proceedings. Exceptions to this provision may be taken only if both the parents and the school district agree otherwise.

3. Responsibility and requirement for the school system to pay for room and board, transportation and psychological services for a residential placement by the school system when these items are a part of the program package provided and required by the program at the residential institution.

Section 121a.302 of the 94-142 regulations states that if placement in a public or private residential placement is necessary to provide speical education and related services to a handicapped child, the program including non-medical care and room and board must be at no cost to parents. Clearly, transportation and psychological services are to be provided if necessary as a part of the related services component as

delineated in Section 121a.13(a) and (b)(8) of the aforementioned regulations. Caution must be exercised to assure that "psychological services" to be provided falls within the criteria of 121a.13(b)(8). The issue of whether psychotherapy should be included under related service is under study. The nature of the services rendered under this terminology causes it to become a semantic problem that must be stated specific.

The federal regulations address the delivery of services as specified in the IEP. The special education and related services to be provided for the handicapped child must be delineated in the IEP prior to placement in a private school or institution. The requirement is defined in Sections 121a.347 and 121.343 of the regulations of 94-142. All of these provisions must be met.

4. Requirement for the school system to pay for 12 month school year program and psychological services for a day school placement when these items are included in an agreed upon and signed IEP.

As indicated in the response to issue No. 1, above, the services set out in the IEP must either be provided to the child or the IEP must be amended. At this time, no Federal policy position on the provision of a 12 month program has yet been developed, although litigation is occurring in several States on this issue (most notably, in Armstrong v. Kline (E.D. Pa. 1979)). The answer provided for issue No. 3 concerning psychological services applies to day school as well as residential placements.

We hope that these responses are helpful to you as you prepare for your hearing. If we can be of further assistance feel free to write or call me at (20) 245-9405.

William D. Tyrrell
Chief, State Policy Section
State Policy and Administrative
Review Branch, DAS
Bureau of Education for
the Handicapped.